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No. 82-1644

In the Supreme Court of the United States

OCTOBER TERM, 1982

VIRGINIA L. SWAIN, PETITIONER

v.

JOHN LEHMAN, JR., SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner, a federal employee, contends that the courts below erred in declining to award her attorney's fees and costs in connection with administrative proceedings on her complaint under Section 15 of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 633a.

1. Petitioner, an employee of the Department of the Navy, filed an administrative complaint on August 11, 1977, claiming that she had been denied a quality step increase and a promotion because of her age, in violation of Section 15 of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a. Administrative hearings were held in 1979. On October 29, 1980, the Department of the Navy, adopting the decision of a Complaints Examiner of the Equal Employment Opportunity Commission, issued a final decision finding that the Department had discriminated against petitioner by failing to promote her. Petitioner was awarded a retroactive promotion, back pay, and retirement adjustments (Pet. App. 4a-5a).

On December 3, 1980, petitioner filed this action in the United States District Court for the District of Columbia. On September 18, 1981, the parties stipulated to the voluntary dismissal of all aspects of the complaint, with the exception of petitioner's claim for attorney's fees and costs in connection with the administrative proceedings (Pet. App. 5a). On January 19, 1982, the district court entered summary judgment for the government on that issue, holding that attorney's fees and costs incurred in connection with administrative proceedings may not be awarded to a person who prevails on a complaint against the federal government under Section 15 of the ADEA (Pet. App. 3a-17a). The court of appeals affirmed by judgment order (*id.* at 1a-2a) on the basis of its prior holding to the same effect in *Kennedy* v. *Whitehurst*, 690 F.2d 951 (D.C. Cir. 1982).

2. The decision of the court of appeals is correct and consistent with the holding of this Court in *Lehman* v. *Nakshian*, 453 U.S. 156 (1981), and it does not conflict with the decision of any other court of appeals. Further review therefore is not warranted.

a. It is, of course, well established that under the American Rule, a prevailing party is not entitled to recover attorney's fees from the opposing party and that the federal courts should not recognize exceptions to that Rule absent specific congressional authorization. See, *e.g.*, *Summit Valley Industries* v. *Carpenters Local 112*, 456 U.S. 717, 721-723 (1982); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 260-262 (1975). Moreover, where, as here, the federal government is the defendant, principles of sovereign immunity require that any authorization for the award of fees—one of the terms of the government's consent to be sued—must be "unequivocally expressed." See *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Testan*, 424 U.S. 392, 399 (1976). The Court

recently held that these principles of sovereign immunity apply to suits under Section 15 of the ADEA, the statutory provision at issue here. See *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981). Relying on these principles, the Court held in *Lehman* v. *Nakshian* that there is no right to a jury trial in a suit against the federal government under Section 15 of the ADEA. The analysis employed by the Court in *Lehman* v. *Nakshian* requires the conclusion that attorney's fees likewise may not be awarded in a suit against the federal government under Section 15 of the ADEA.

Section 15(c) of the ADEA provides that "[a]ny person aggrieved [by age discrimination in federal employment] may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this [Act]." 29 U.S.C. 633a(c). There is no express authorization for an award of attorney's fees. Under the American Rule and the doctrine of sovereign immunity, this alone is a sufficient basis for concluding that fees may not be awarded. This conclusion is reinforced by the fact, explained below, that when Congress wanted to authorize an award of attorney's fees under other sections of the ADEA, it expressly so provided. *Lehman* v. *Nakshian*, *supra*, 453 U.S. at 162-163; *Fedorenko* v. *United States*, 449 U.S. 490, 512-513 (1981).

When it originally was enacted in 1967 (Pub. L. No. 90-202, 81 Stat. 602), the ADEA applied only to private employers, not to the federal, state and local governments. *Lehman* v. *Nakshian*, *supra*, 453 U.S. at 166. Under Section 7(b) of the ADEA, 29 U.S.C. 626(b), the Act is enforced against private employers in accordance with procedures provided in the Fair Labor Standards Act (FLSA), 29 U.S.C. (& Supp. V) 201 *et seq.* See *Lehman* v. *Nakshian*, *supra*, 453 U.S. at 160; *Lorillard* v. *Pons*, 434 U.S. 575, 578-583 (1978). Section 16(b) of the FLSA, 29 U.S.C. (Supp. V) 216(b), expressly provides for the award

of attorney's fees and costs in an action brought by a person against an employer who violates that Act, and such fees and costs therefore may be awarded in a suit against a private employer under Section 7(c) of the ADEA, 29 U.S.C. (Supp. V) 626(c).

Congress amended the ADEA in 1974 (Pub. L. No. 93-259, Section 28, 88 Stat. 74) to cover federal, state and local government employees. State and local governments were brought under the existing enforcement scheme applicable to private employers by expansion of the term "employer" in Section 4(a) of the ADEA, 29 U.S.C. 623(a), to include state and local governments. This had the effect of extending the procedural provisions of the FLSA to suits against such entities (*Lehman* v. *Nakshian*, *supra*, 453 U.S. at 166), including the provision for attorney's fees. But although it was first proposed to include the federal government under the existing FLSA enforcement scheme as well (*id.* at 166-167 n.14), Congress instead enacted a separate provision — Section 15 — addressing age discrimination in federal employment. As this Court has observed, Section 15 does *not* incorporate the FLSA enforcement scheme for federal sector ADEA cases (*Lehman* v. *Nakshian*, *supra*, 453 U.S. at 163, 166-167), and the FLSA's authorization for the award of attorney's fees and costs therefore does not apply to federal sector cases.[1] This conclusion was reinforced in 1978 by the enactment of Section 15(f) of the ADEA, 29 U.S.C. (Supp. V) 633a(f), which provides that, with one exception

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[1]Congress instead patterned Section 15 of the ADEA after Section 717 of Title VII of the Civil Rights Act of 1964, as amended in 1972 (Pub. L. No. 92-261, 86 Stat. 111-112), 42 U.S.C. 2000e-16, which governs discrimination in federal employment on the basis of race, color, national origin, religion and sex. Significantly, under Title VII, Congress *expressly* incorporated into the federal sector Title VII provisions the attorney's fee provision applicable to private sector cases. See 42 U.S.C. 2000e-16(d), incorporating 42 U.S.C. 2000e-5(k).

not relevant here, federal personnel actions "shall not be subject to, or affected by, any provision of this chapter other than * * * the provisions of this section." This language makes explicit that Section 7(b) of the ADEA—the section that incorporates the FLSA procedures for ADEA suits against private employers and state and local governments—does not apply to federal sector ADEA suits under Section 15. See *Lehman* v. *Nakshian, supra*, 453 U.S. at 163, 167-168.[2]

b. Petitioner acknowledges that there is an "absence of an explicit authorization of fees in the statute" (Pet. 37), but she contends (Pet. 24-31) that an award of attorney's fees is encompassed within the provision in Section 15(c) for the award of "such legal and equitable relief as will effectuate the purposes of [the] Act." This contention is without merit. The quoted language cannot be viewed as the requisite "unequivocally expressed" waiver of the government's sovereign immunity to the payment of attorney's fees. See *United States* v. *Bodcaw Co.*, 440 U.S. 202, 203-204 & n.3 (1979) (litigation costs not part of "just compensation" required to be paid by Fifth Amendment). Nor, against the

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[2]Petitioner contends (Pet. 38-42) that prior to the 1978 amendments adding Section 15(f), the FLSA procedures—including the authorization for the award of attorney's fees—applied to federal sector cases and that the 1978 amendment should not be applied retroactively to her case, which was commenced administratively by the filing of a complaint in 1977, before passage of the 1978 amendments. This argument is frivolous. The FLSA procedures were inapplicable to federal sector ADEA cases even prior to the enactment of Section 15(f), which simply made this inapplicability explicit. *Lehman* v. *Nakshian, supra*, 453 U.S. at 166-167. Moreover, even if the 1978 amendments were thought to adopt new law barring the award of attorney's fees for the first time, those amendments were enacted prior to the administrative hearing that presumably consumed most of petitioner's attorney's efforts. Finally, to the extent that petitioner's claim depends upon the construction of pre-1978 law, it is of no continuing importance.

background of the American Rule, can the ordinary meaning of the language be extended to encompass the distinct element of fees. Cf. *Summit Valley Industries* v. *Carpenters Local 112, supra*, 456 U.S. at 724-725.

Moreover, Section 7(c) provides for the award of relief in non-federal sector ADEA suits in the same language as that in Section 15(c), upon which petitioner relies. The identical language in Section 7(c) is not the source of the authorization for the award of attorney's fees in non-federal sector cases. Congress instead found it necessary to authorize the award of attorney's fees and costs in Section 7(b), through the incorporation of the provision for attorney's fees and costs under the FLSA. The same language therefore cannot be construed in Section 15(c) implicitly to include an authorization for the award of fees. Furthermore, this Court recently has stressed that the American Rule barring the award of attorney's fees except where Congress has expressly so provided cannot be circumvented—and fees in connection with prior administrative proceedings allowed—merely because a court might believe that such an award would further the congressional purpose underlying the statute. See *Summit Valley Industries* v. *Carpenters Local, supra*, 456 U.S. at 723-726.[3] That rationale applies equally here.[4]

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[3]Petitioner errs in relying (Pet. 31-37) on the authorization in 5 U.S.C. (Supp. V) 7701(g)(2) for the award of fees in certain proceedings before the Merit Systems Protection Board. Congress there, of course, expressly authorized the award of fees in connection with a particular type of administrative proceeding. Congress did not do so, however, under Section 15 of the ADEA.

[4]Petitioner does not contend that she is entitled to an award of fees and costs under the Equal Access to Justice Act, 28 U.S.C. (Supp. V) 2412(d)(3). There would be no occasion to consider that question here in any event, because the administrative proceedings in this case terminated well before the October 1, 1981 effective date provided in Section

In any event, even if the award of attorney's fees in connection with *judicial* proceedings could be said to be appropriate to effectuate the purposes of the Act (see *DeFries* v. *Haarhues*, 488 F. Supp. 1037 (C.D. Ill. 1980)), as the court of appeals held in *Kennedy* v. *Whitehurst*, *supra*, 690 F.2d at 963-965 (Pet. App. 73a-79a), this rationale does not apply to fees incurred in connection with administrative proceedings. Unlike the situation under Title VII of the Civil Rights Act of 1964 (see 42 U.S.C. 2000e-16(c)), the full pursuit of administrative remedies under Section 15 of the ADEA is optional; the only requirement is that notice be given to the Equal Employment Opportunity Commission at least 30 days in advance of filing suit. 29 U.S.C. 633a(d). Administrative proceedings thus play a somewhat less important role under the ADEA.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
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208 of that Act, Pub. L. No. 96-481, 94 Stat. 2330. *S & H Riggers & Erectors, Inc.* v. *OSHRC*, 672 F.2d 426, 428 (5th Cir. 1982); *Tyler Business Services, Inc.* v. *NLRB*, 695 F.2d 73, 76-77 (4th Cir. 1982); *Muth* v. *Marsh*, 525 F. Supp. 604, 609 (D.D.C. 1981).

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